

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF TEXAS
 FORT WORTH DIVISION

EXXON MOBIL CORPORATION,)	4:16-CV-469-K
Plaintiff,)	
)	
VS.)	
)	
)	DALLAS, TEXAS
ERIC TRADD SCHNEIDERMAN,)	
Attorney General of New)	
York, in his official)	
capacity, and MAURA TRACY)	
HEALEY, Attorney General of)	
Massachusetts, in her)	
official capacity,)	
Defendants.)	November 16, 2016

TRANSCRIPT OF TELEPHONE CONFERENCE
 BEFORE THE HONORABLE ED KINKEADE
 UNITED STATES DISTRICT JUDGE

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Proceedings reported by mechanical stenography and
transcript produced by computer.

1 TELEPHONE CONFERENCE - NOVEMBER 16, 2016

2 P R O C E E D I N G S

3 THE COURT: Good morning. Let me make sure who I
4 have got.

5 Mr. Anderson?

6 Hello?

7 Mr. Anderson?

8 MR. ANDERSON: Good morning, Judge.

9 THE COURT: Ms. Cortell?

10 MS. CORTELL: Yes, Your Honor. I've got a full list
11 if that would help.

12 THE COURT: Is it Richard Johnston?

13 MR. JOHNSTON: Yes, Your Honor.

14 THE COURT: And then Mr. Arz?

15 MR. ARZ: Yes, Your Honor. Good morning.

16 THE COURT: Good morning.

17 How is the weather in New York?

18 MR. ARZ: Good.

19 MR. BROWN: And, Your Honor, this is Jason Brown.
20 I'm the chief deputy for the New York Attorney General's
21 office. I'm on the line as well.

22 And the weather up here is actually not so bad.

23 THE COURT: What does that mean?

24 Is it raining -- raining and cold?

25 MR. BROWN: Yesterday it was raining and cold.

1 Today, it's funny, it's a little bit warmer, so --

2 THE COURT: Oh, well, good. Good.

3 MR. BROWN: (Inaudible)

4 THE COURT: Well, good. So -- all right. Anybody
5 else on the line?

6 MS. CORTELL: Your Honor, it's Nina Cortell. Let me
7 give you a full list, if that's okay.

8 THE COURT: Sure.

9 MS. CORTELL: I think that might expedite it.

10 THE COURT: Okay.

11 MS. CORTELL: So for ExxonMobil, in addition to
12 Justin Anderson, you have myself, Nina Cortell, Ted Wells, Pat
13 Conlon, Dan Bolia, and Michele Hirshman.

14 For the Massachusetts Attorney General, in addition
15 to Richard Johnston, you have Melissa Hoffer and Doug Cawley.

16 And for the New York Attorney General you have -- in
17 additional to Mr. Arz and Jason Brown, you have Pete Marketos
18 and Jeff Tillotson.

19 THE COURT: Mr. Tillotson. You haven't been in here
20 since you became an independent lawyer. How are you doing?

21 MR. TILLOTSON: I'm doing fine, Your Honor. Thanks
22 for asking. I'm -- I'm my own boss, and so I routinely both
23 hire and fire myself every afternoon.

24 THE COURT: Well, there you go. I wasn't worried
25 that you were going broke. I just wondered what was going on

1 with you. That's good. Good to have you back.

2 Okay.

3 MR. TILLOTSON: Thank you.

4 THE COURT: You know, I've got Ms. Cortell's letter,
5 and I guess her concern and my concern, too, at this point is
6 whether or not Attorney General Schneiderman -- isn't that the
7 right way to say it, general? Just call him General
8 Schneiderman and General Healey, whether they're going to
9 comply with the order on the discovery or not and/or what's
10 going to happen there. And I just wanted to kind of hear
11 y'all's response from that.

12 MR. JOHNSTON: Your Honor, this is Richard Johnston.
13 You heard from me in September when we were down there arguing.
14 I will talk for the Attorney General's Office in Massachusetts.

15 As Your Honor will probably recall when we were
16 before you the last time, we argued quite strenuously that the
17 Court didn't have personal jurisdiction over Attorney General
18 Healey. We argued secondarily that the Court should abstain
19 from taking the case because there was almost equivalent
20 proceeding in a Massachusetts state court.

21 We also argued there was no real irreparable harm
22 because Exxon had already produced many of the same documents
23 to New York.

24 And when we left court, or as we were leaving court,
25 you told us -- you told the parties that it seemed strange that

1 Exxon had produced a lot of documents to New York but wouldn't
2 give them to Massachusetts, and directed the parties to have a
3 discussion, and failing a discussion between us that we would
4 mediate before Judge Stanton.

5 We had discussions about the subject, and then we had
6 a mediation with Judge Stanton, and we left the process with no
7 documents from Exxon.

8 To our somewhat surprise we then got almost
9 immediately the discovery order, which seemed to relate
10 primarily the issue of abstention, at which point we filed a
11 motion for reconsideration with Your Honor on the discovery
12 order because we pointed out that the law on personal
13 jurisdiction seemed very clear under the Fifth Circuit, that
14 there was no ability on the part of the Court to exercise
15 jurisdiction over an attorney general from another state, no
16 federal court anywhere in the country had done that over the
17 opposition of an attorney general and Exxon didn't provide any
18 such cases. So that motion for reconsideration is still
19 pending.

20 In the meantime, we received from Exxon approximately
21 a hundred and so written discovery requests, including
22 interrogatories, document requests, and requests for admission.
23 We also got notices of the deposition for Attorney General
24 Healey herself and -- to assist the attorneys general.

25 Now, each one of those discovery requests had a

1 particular time period for responding under the rules, and we
2 do intend to respond to all of them under the rules. And as we
3 have said in at least one other paper, we do intend to object
4 to the discovery, including depositions of Attorney General
5 Healey and her associates and to the other forms of discovery.

6 But we will be filing those in a timely fashion. I
7 think in direct response to Ms. Cortell's concern, we do not
8 expect that Attorney General Healey or the other assistant
9 attorneys general will show up for depositions. We will be
10 filing motions with respect to those prior to the depositions.

11 I should note that when we got the notices -- we got
12 the letter from Exxon's counsel, I think on Friday during the
13 holiday about whether we would show up or not, and when by
14 Monday afternoon we had not yet responded, they sent a letter
15 to Your Honor saying there was concern about whether people
16 were going to show up.

17 So it's not as though there was any long delay in
18 letting people know. I think less than -- there hadn't even
19 been a working day on Friday and we were a few hours into the
20 working day on Monday and we still had several days before our
21 formal responses were due.

22 So we will be filing those responses, and the
23 responses will, among other things, talk about the fact that it
24 is heavily, heavily disfavored to have top executive officials,
25 including attorneys general, deposed about their thought

1 processes in bringing particular matters.

2 And what we seem to have here, as we argue in our
3 motion for reconsideration, is a situation where the normal
4 investigatory process has been turned on its head.

5 We still in response to our civil investigation
6 demand have not received one document from Exxon, and yet Exxon
7 is going after the Attorney General's entire thought process
8 through a hundred written discovery requests and more and then
9 three depositions of key people who are involved in the
10 decision-making process.

11 So our motion for reconsideration focuses on that as
12 will our objections to the specific discovery requests which
13 they have made.

14 THE COURT: Is that no?

15 MR. JOHNSTON: That is a no.

16 THE COURT: That's the longest no I have had in two
17 or three weeks, but it's okay. I'm used to that. You're a
18 lawyer.

19 All right.

20 MR. JOHNSTON: Also it's been a few -- it's been a
21 couple of months now since we were before you, and I know you
22 have been in a busy trial. And, you know, sometimes it's
23 important to just remind everybody where we -- where we think
24 we are on this.

25 THE COURT: I appreciate that, and that -- you know,

1 I was a history minor, and so I always like history, and so not
2 that I always need it, and I kind of like to choose which
3 history I'm -- you know, whatever.

4 But I kind of do keep up with my docket, what's going
5 on. But I'm glad for you to keep up with it, too. That's
6 always fascinating, and that's -- you know, you talk about
7 things are unusual. I would say that's a little unusual to
8 think that, you know, your comments about we got this unusual
9 thing from the Court. You know, whatever.

10 You can make whatever comments you want to make. I'm
11 going to make whatever rulings I think are appropriate, and
12 I'll rule on your motion when I -- in due time.

13 So I'll take that as an answer of no.

14 All right. Mr. Schneiderman's representative --
15 excuse me. General Schneiderman's representative, who is going
16 to be -- tell me who's speaking for him.

17 Mr. Arz?

18 MR. BROWN: So, Your Honor, again, Chief Deputy Jason
19 Brown speaking.

20 THE COURT: Oh, I'm sorry. Okay.

21 MR. BROWN: I'm going to take Your Honor's cue, the
22 answer is no. I'm happy to expand at greater length.

23 The only thing I would note at this point is we were
24 served as nonparty. We got nonparty discovery requests, you
25 know, basically hours or a day or so before we became a party,

1 so that's also an issue that needs to be fleshed out.

2 But -- but for the reasons that Mr. Johnston said and
3 others that are unique to me, you are the -- we'll need to
4 exercise our right to make appropriate objections to that
5 discovery request.

6 THE COURT: Are you a party now?

7 MR. BROWN: Now? Yes. I think we were served
8 earlier. We're new to the dance, as the Court knows. Today is
9 Wednesday. I think we became a party either on Monday or
10 yesterday. So this is all very new to us.

11 MS. CORTELL: Your Honor, it's Nina. It may be new
12 to New York, but the order amending was November 10th, and then
13 they immediately went into court in New York and sought to
14 pursue a subpoena there which they had now set for hearing on
15 this coming Monday. And that's really what prompted our
16 letter, because in their papers they're saying that New York is
17 the appropriate place to litigate this, whereas we're already
18 set here on discovery that was then pending.

19 And so what we're hoping to do is set up a protocol
20 here to handle our discovery which was issued properly pursuant
21 to this Court 's October 13 order permitting discovery.

22 we acted promptly, which I think the Court would have
23 expected us to do. The discovery is returnable as early as
24 some of it tomorrow and early next week.

25 we had asked them for confirmation if they were going

1 to comply. We had not heard back. And in the meantime they go
2 into court in New York and assert jurisdiction there, and
3 that's what prompted the letter.

4 So what we're here for today is to ask for a
5 protocol, if you will, for how to handle discovery, discovery
6 disputes, so that we, you know, get the discovery we're
7 entitled to under this Court's order.

8 THE COURT: Y'all want to respond?

9 MR. BROWN: Yes, Your Honor. Jason Brown again. I
10 mean, Ms. Cortel has slightly butchered the procedural history
11 here. We had, as I think the Court knows, a prior case pending
12 in New York where actually Justice Ostrager had issued an
13 opinion rejecting one of their arguments, as Mr. Wells knows.
14 He appeared in court on that.

15 So this is not some new litigation intended to do an
16 end-run around anybody. It was simply pursuing the motion to
17 compel that we had previously begun litigation on for a
18 subpoena that long predated any issues that Exxon raises in the
19 Texon case -- in Exxon case that has been pending now for over
20 a year on the subpoena.

21 So what we did is when we got the -- when we were
22 added as a party, we -- we wrote to Paul, Weiss and asked
23 whether they would withdraw those subpoenas since we were now a
24 party.

25 On Saturday we received the response no, and then the

1 next thing we knew we were being scheduled for a status
2 conference here.

3 So I'm still a little unclear as to what is being
4 requested, but obviously we haven't missed any deadlines yet.
5 We are planning to participate in a way that makes the Court
6 aware of our -- our issues.

7 Right now, because they are styled as Rule 45
8 nonparty discovery requests, the only court that would have
9 jurisdiction over that dispute, because the depositions have
10 been noticed here in Manhattan, would be the Southern District
11 of New York.

12 So right now, without withdrawing their prior
13 subpoenas to us, we have no choice but to go to the Southern
14 District of New York. Again, these are issues that perhaps,
15 know, we would have been better off discussing with Paul, Weiss
16 directly, but they requested a status conference, so here we
17 are.

18 MR. ANDERSON: Judge, this is Justin Anderson. May I
19 respond to a few of those points?

20 THE COURT: Yes.

21 MR. ANDERSON: Well, first, I would just like to say
22 Ms. Cortell did not butcher any -- any history, procedural or
23 otherwise. The matter that was pending before the New York
24 Supreme Court had to do with a subpoena that the New York
25 Attorney General issued to PricewaterhouseCoopers. That was

1 the subject matter of that litigation, and that is the only
2 litigation that was pending before they rushed into court on
3 Monday morning to raise the subpoena that was at issue before
4 this Court.

5 So in terms of the procedural history, it is not
6 correct to suggest that this matter was before the Court in New
7 York. It was a separate subpoena issued to ExxonMobil's
8 auditors.

9 Second, the request on Friday to adjourn the subpoena
10 that had been issued to ExxonMobil to the New York Attorney
11 General, that request had nothing to do with the addition of
12 the New York Attorney General as a party to this action.

13 You know, the basis in the letter was that there is a
14 motion for reconsideration and a motion to dismiss pending, and
15 the New York Attorney General requested that we adjourn the
16 return date pending this Court's resolution of those motions.

17 We responded in the letter promptly that that would
18 make no sense because you ordered discovery to determine
19 whether there is jurisdiction. So putting off discovery until
20 jurisdiction has been resolved was nonsensical.

21 Aside from -- aside from that letter, we had heard
22 nothing from either the Massachusetts Attorney General or the
23 New York Attorney General in response to the discovery request
24 that we made.

25 And we made our first set of discovery requests at

1 the end of October.

2 On October 24th we served Massachusetts.

3 We then served New York on the 3rd of November.

4 So this idea that we came rushing to you without
5 giving them any time to respond, that is truly a butchering of
6 the record.

7 And, finally, Judge, you know, with respect to the
8 subpoenas, if -- if -- it is correct that right now all that is
9 pending is the third-party subpoenas, and they naturally would
10 be -- if there is a motion to quash or a motion to compel, it
11 naturally would -- would begin in the Southern District of New
12 York. But there is a procedure for transferring jurisdiction
13 of -- of any motion to quash in connection with those subpoenas
14 to this Court.

15 And in light of the fact that those subpoenas now
16 pertain to parties to the litigation before this Court, they
17 would be -- it would be quite likely that if a motion to
18 transfer is made that those objections find their way to you.

19 THE COURT: Well, here's -- let me -- let me begin by
20 saying, Mr. Brown, you scored some points by being -- with the
21 Court by being frank and to the point. So I'm making you an
22 honorary, as you said, Texon. I don't know what that is. But
23 I'm going to make you -- I look forward to having you here
24 sometimes and I will tease you about that. That's a good name
25 for some future company, I guess.

1 But, anyway, here's what I would like to do,
2 especially since I'm in this trial that may take the rest of my
3 adult days to finish, and then I have another one starting in
4 January with Facebook and a local company here, another big
5 case.

6 So what I would like to do is convert Judge Stanton
7 to a special master to deal with y'all on this so you can be
8 talking to somebody regularly. He's my special master on this
9 case. I have complete confidence in him. Obviously, I need
10 y'all's permission to do that. And you're going to -- you're
11 going to have to pay for that among yourselves.

12 But then we can get something, and you'll have
13 somebody to have my ear when my other part of me is sitting out
14 there and we can get this moving and can consider all of
15 your -- you know, your various concerns.

16 I get it. And it's -- you know, we're getting pretty
17 close to the point of loggerheads. And okay, that's fine. And
18 try to figure that answer out.

19 Is that okay with the parties at this point?

20 I will make sure that he does not overcharge or
21 undercharge you, if that's okay. I think he charges about
22 \$725.00 an hour. And, you know, that's what Johnson &
23 Johnson -- I think that's what they're paying him in here.

24 But, anyway, so that's what I would like to be able
25 to do so we can get something going on it and try to get

1 something besides us talking on the phone and get some
2 resolution for y'all as quickly as possible.

3 So what about New York, Mr. Brown?

4 MR. BROWN: Thank you, Your Honor. And -- and I
5 think we all very much appreciate the spirit of that
6 suggestion.

7 My only concern -- and I -- you know, I know lawyers
8 always come up with concerns. But we -- we obviously do have a
9 personal jurisdiction defense that we wanted to be careful not
10 to waive.

11 THE COURT: I'm not trying to get you to waive -- I
12 don't want you to waive anything. I'm not -- you know, yes,
13 you don't know me, but I'm not -- I'm not trying to sneak up on
14 you or anybody else. That's not my style. We're going to
15 fight this thing out, y'all are, one way or the other, and it's
16 not going to be based upon, you know, that sort of thing, okay?

17 I'm not -- I'm not trying to get you to do that,
18 okay?

19 This is on the record. This is on the record. I
20 don't know how much clearer I can be than that, okay?

21 MR. BROWN: Okay. Thank you, Your Honor.

22 THE COURT: Is that okay?

23 So it's okay with you?

24 MR. BROWN: Yeah, I mean, we haven't -- unfortunately
25 we have taxpayer money that we have to account for, but

1 conceptually I think that's fine.

2 THE COURT: Okay.

3 MR. BROWN: I just have to work out the mechanics of
4 how that would -- how we would be able to find funding for our
5 payment. That's all.

6 THE COURT: Yeah, but don't you do that now in
7 various cases?

8 MR. BROWN: No. Actually, no.

9 THE COURT: You don't?

10 MR. BROWN: I'm not looking to throw -- Your Honor,
11 I'm not looking to throw a roadblock, so let's do this issue
12 and then let the Court know.

13 THE COURT: Well, who's -- who's paying for Marketos?

14 MR. BROWN: Marketos, Your Honor.

15 THE COURT: Yeah, but, I mean, he's -- you're paying
16 for him, right?

17 MR. BROWN: Yeah. No. And -- we have to get to
18 several levels of authorization to do it. So, again, Your
19 Honor, I don't mean to put a --

20 THE COURT: And Tillotson doesn't work for free.
21 Tillotson doesn't work for free at all, because I've had him in
22 here. He's the most expensive lawyer in Dallas.

23 MR. TILLOTSON: I'm going to take that as a
24 compliment.

25 THE COURT: It is a compliment.

1 MR. TILLOTSON: Have to go through a big process and
2 approval process that we went through, so I think there's
3 just -- they want to make sure they can -- they can fund this
4 in a way --

5 THE COURT: Yeah. Okay. Mr. Tillotson, will you
6 just -- just commit to me -- yeah, Mr. Tillotson, will you just
7 commit to me you will do your best to get this done?

8 MR. TILLOTSON: Of course, Your Honor. Absolutely.

9 THE COURT: Yeah. Okay. And you know -- you know
10 Judge Stanton well, correct?

11 MR. TILLOTSON: I do, Your Honor. I just want to
12 make sure -- he needs to clear conflicts, because obviously I
13 have had relationships with him and against him in the past, so
14 he will need to inform everyone obviously of any conflicts he
15 may have with the parties.

16 THE COURT: Okay.

17 MR. TILLOTSON: I have no problem with him being
18 special master.

19 THE COURT: Yeah. Yeah. Okay. Well, yeah.
20 Obviously, everybody has got to do that.

21 All right. All right. And then I haven't meant to
22 ignore you, Mr. Johnston.

23 MR. JOHNSTON: I will be short, Your Honor. I echo
24 Mr. Brown's comments. Because it is taxpayer money I don't
25 have the authority to commit to that, so I will have to have

1 discussions internally here.

2 THE COURT: Well, you did hire Mr. Cawley, correct?
3 Is that correct?

4 MR. JOHNSTON: That's correct.

5 THE COURT: And McKool Smith is known on what I see
6 locally as the most expensive law firm and the most
7 successful -- one of the successful firms, I'm sure that you
8 would agree, wouldn't you, Mr. Cawley?

9 MR. CAWLEY: Well, I'd agree -- I'd love to agree
10 with the second half, Your Honor. On the first one I'd say
11 maybe we're not the most expensive after getting through
12 negotiating with the State of Massachusetts.

13 THE COURT: Oh, I'm sorry. But you are a very
14 successful firm and do extremely well, partner by partner,
15 correct?

16 MR. CAWLEY: Yes, Your Honor.

17 THE COURT: I know.

18 Okay. So y'all work on getting that done. Assuming
19 that you can work through whatever layers there are -- there
20 are, you'll work on that?

21 Yes?

22 MR. CAWLEY: Absolutely.

23 THE COURT: Who said that?

24 UNIDENTIFIED SPEAKER: Absolutely, Your Honor.

25 THE COURT: Who said that, for the record?

1 MR. CAWLEY: This is Doug Cawley. I'm one person who
2 said we'll work on it.

3 THE COURT: And also, Mr. Johnston, do you, too?

4 MR. JOHNSTON: I do. I do, too.

5 THE COURT: Hey, is the T silent or not in your --
6 Johnston?

7 MR. JOHNSTON: Not the way I pronounce it, Your
8 Honor.

9 THE COURT: Okay. I'm working on trying to get you
10 to be a -- what did we make -- what did I make Mr. Brown? A
11 Texon.

12 MR. BROWN: Not a very strong --

13 THE COURT: Texon. A Texon. You're next. We're
14 going to --

15 MR. BROWN: A Texon.

16 THE COURT: Okay.

17 MR. JOHNSTON: Last time you told me I was your
18 thirteenth favorite Yankee.

19 THE COURT: That's correct. Okay. well --

20 MS. CORTELL: And, Your Honor, for the record,
21 ExxonMobil of course is agreeable, and we'll work with the
22 parties to that end.

23 THE COURT: Oh, you were next.

24 Okay. So y'all work on that. And get that done in
25 the next day or two so we can get that resolved before

1 Thanksgiving, and we can kind of get things moving, okay?

2 And then try to set up --

3 MR. BROWN: Your Honor?

4 THE COURT: Yes, sir.

5 MR. BROWN: Your Honor, this is Mr. Brown here.

6 Implicit in what you're saying, I hope, is because I think our
7 objections -- our court filing might be due as early as
8 tomorrow -- is that the current discovery requests are stayed
9 pending our discussions to work with the special master?

10 THE COURT: Well, you agree on the special master and
11 then we'll see, okay?

12 So -- all right. That does kind of put the pressure
13 on y'all to get on it, so let me know.

14 You know what? I have always found that what we want
15 to do or can -- we can get things done through the process of
16 whatever. I realize there's a lot of lawyers in the attorney
17 generals' offices, but there's one at the top and can make
18 these decisions, and so y'all get that done, okay?

19 Anything else y'all want to talk to me about?

20 MS. CORTELL: I'm assuming that there's no implied
21 stay as a result of this conference.

22 THE COURT: I'm not staying anything. I'm not
23 staying anything. No. If you want to stay, file something and
24 ask me for it, okay?

25 MS. CORTELL: Okay.

1 THE COURT: All right.

2 MS. CORTELL: Thank you, Your Honor.

3 THE COURT: All right. Y'all --

4 MR. BROWN: Thank you, Your Honor.

5 THE COURT: Thank y'all. And we'll look forward to
6 seeing y'all again soon, and have a wonderful Thanksgiving.

7 MS. CORTELL: You, too, Your Honor. Thank you.

8 MR. BROWN: Thank you, Your Honor.

9 THE COURT: Thank y'all. Bye-bye.

10 (Hearing adjourned)

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Telephone conference..... 5

1 I, TODD ANDERSON, United States Court Reporter for the
2 United States District Court in and for the Northern District
3 of Texas, Dallas Division, hereby certify that the above and
4 foregoing contains a true and correct transcription of the
5 proceedings in the above entitled and numbered cause.

6 WITNESS MY HAND on this 17th day of November, 2016.

7
8
9 /s/Todd Anderson

10 TODD ANDERSON, RMR, CRR
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